

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 6, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: January 5, 2005

Case Number: TSO-0181

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the individual") to hold an access authorization.<sup>1</sup> The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that access authorization should not be restored in this case.

I. BACKGROUND

This administrative review proceeding began with the issuance of a Notification Letter by a Department of Energy (DOE) Office, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization in connection with his work. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a statement of the derogatory information causing the security concern.

The security concern cited in the Letter involves the individual's excessive use of alcohol. The Notification Letter stated that the

---

1/ An access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

individual has been diagnosed by a DOE consultant psychiatrist (hereinafter consultant psychiatrist) as using alcohol habitually to excess and as suffering from alcohol abuse. The Notification Letter also indicated that the individual has not shown adequate evidence of rehabilitation or reformation. These conclusions were set forth in the consultant psychiatrist's evaluation letter of February 2004. According to the Notification Letter, this constitutes derogatory information under 10 C.F.R. § 710.8(j)(hereinafter Criterion J). <sup>2</sup>

The Letter also indicates that the individual has engaged in unusual conduct or is subject to circumstances that tend to show he is not honest, reliable or trustworthy, or that furnish reason to believe he may be subject to pressure, coercion, exploitation or duress, which may cause him to act contrary to the best interests of the national security. 10 C.F.R. § 710.8(l)(Criterion L). In this regard, the Letter notes a 1982 intoxication incident that occurred while the individual was in the military and for which he received a Letter of Reprimand. <sup>3</sup> The Letter also notes that in 1991, the individual was arrested for simple assault following an altercation at a bar. According to the Notification Letter, in 2001, the individual was arrested for driving while intoxicated (DWI).<sup>4</sup> The Letter further indicates that in 2003 the individual was arrested for operating a vehicle while intoxicated (OWI). He failed field sobriety and breathalyzer tests and pled guilty to the OWI charge.

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer, in order to respond to the information contained in that letter. The individual requested a hearing, and that request was forwarded by the DOE

- 
- 2/ Criterion J security concerns relate to an individual's use of alcohol habitually to excess, or to an individual's having been diagnosed by a psychiatrist or licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.
  - 3/ The Notification Letter also refers to a 1983 incident, not involving alcohol, in which the individual was arrested for disorderly conduct.
  - 4/ The Letter indicates that this charge was dismissed in a jury trial, although the individual admitted that he had been drinking prior to the arrest and failed a field sobriety test at the time of the arrest.

Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of six friends and colleagues. The DOE Counsel presented the testimony of the DOE consultant psychiatrist.

## II. Hearing Testimony and Documentary Evidence

### A. Documentary Evidence Presented at the Hearing

At the hearing, the individual submitted some additional evidence concerning the alcohol recovery program for which he has registered. First, the individual provided a copy of some testimony in a prior hearing given by the DOE consultant psychiatrist to the effect that this particular program is an effective one that has a good reputation. Individual's Hearing Exhibit A at 96. The individual also submitted a copy of his "Initial Treatment Plan," dated March 18, 2005, and drawn up by a therapist in this rehabilitation program. That plan indicated that the individual's "presenting problems" were (i) alcohol abuse and loss of DOE clearance and (ii) "a minimal support structure." The recommended "services" for these problems were 48 weeks in a relapse prevention group, and AA meetings once a week for an as yet undetermined period. Individual's Hearing Exhibit B.

### B. Testimony

#### 1. The Individual

The individual testified that he had not consumed any alcohol since New Year's eve 2004-2005. Tr. at 85. He stated that he had given up alcohol use because "I want my career back." Tr. at 86. He indicated that if drinking alcohol "causes a problem with my career, there is a problem." Tr. at 87. Nevertheless, it is the individual's belief that the two vehicle-related incidents of 2001 and 2003 were caused by the stress involved in the break-up with his girlfriend/fiancee. The individual claims that these two events are isolated, and therefore do not constitute evidence of an overall alcohol problem. *Id.* He does not believe that he drank to excess. Tr. at 96. He stated that it was his intention never to drink again, and that he will do "whatever it takes to get my career back." Tr. at 92. The individual testified that his first therapy

session with his recovery program would to take place the day after the hearing. <sup>5</sup> Tr. at 104.

The individual also gave some testimony regarding the two most recent incidents forming the basis for the Criterion L concern. With respect to the 2001 incident, the individual testified that he has established that he was not intoxicated at the time of the arrest for DWI, because he was "acquitted of that charge by a six-member jury." Tr. at 95. With respect to the 2003 arrest, the individual admits he was intoxicated. However, he states that he was not driving the car, but merely exiting the car after sitting in it without driving. He asserted that the report of the police officer stating that she observed the individual "pulling to the curb and parking" was an error. Tr. at 93. See DOE Exhibit 3-3,

## 2. The DOE Consultant Psychiatrist

The consultant psychiatrist reiterated the findings set forth in the evaluation letter. He believed that the individual suffered from alcohol abuse. He maintained that in order to demonstrate reformation/rehabilitation, the individual should establish that he has abstained from alcohol for at least one year and participate in a program such as AA, as well as receive some alcohol counseling and therapy for a period of time recommended by a substance abuse professional. Tr. at 24-25. He testified that at the time of the evaluation, the individual had not demonstrated that he had taken those steps. Tr. at 36. He further testified that the program that the individual had signed up to enter is a good one and that the 48 weeks recommended by the therapist is adequate. Tr. at 28-29. He indicated that there should be an AA component to the program for it to be complete. Tr. at 107.

The consultant psychiatrist believed that the individual's pattern of alcohol use was binge drinking when he was under stress, and that the individual needed to learn to handle stress. Tr. at 102-03, 109. He testified that the individual's problem "is on the mild end of the spectrum." Tr. at 112. He approved of the fact that individual had acknowledged a problem, had sought out a treatment plan, and wanted to make a change in his life. The psychiatrist saw this "as kind of a dawning. . . He's gradually coming around. . . I think he's just getting there." Tr. at 109-110.

---

<sup>5</sup>/ The individual enrolled in his therapy program 5 days prior to the hearing. Individual's Hearing Exhibit B.

### 3. Character Witnesses

The individual presented 6 character witnesses. These included social friends, past and present housemates, colleagues and supervisors. Several of the witnesses who knew the individual on the job also had some social contacts with him. The colleagues and supervisors stated that he was a valuable employee, and that he had not had any alcohol problems on the job. Tr. at 43, 53, 56, 57, 72. Witnesses who knew him socially or who were his housemates confirmed that they had not seen the individual use alcohol since January 2005. Tr. at 63, 71.

### III. Applicable Standards

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

#### IV. Analysis

The issues in this case are (i) whether the individual has mitigated the Criterion J concern by demonstrating that he is reformed and/or rehabilitated from his abuse of alcohol; and (ii) whether he has resolved the Criterion L concern caused by the arrests cited in the Notification Letter, all but one of which were alcohol-related. As discussed below, I find that the individual has not resolved those security concerns.

##### Criterion J

I believe that, as he testified, the individual has been abstinent from alcohol since New Year's eve of 2004-2005. The individual's character witnesses who had knowledge of this matter corroborated the individual's testimony that he has been abstinent since January 2005. I believe that the individual is motivated to maintaining abstinence because he is sincerely committed to retaining his job at the DOE. He has also taken the positive step of signing up for a rehabilitation program.

However, as indicated above, the DOE consultant psychiatrist testified that in order to be considered rehabilitated, this individual needs a recovery program lasting for a year, as well as an abstinence period of one year. The individual has not offered any evidence to indicate that the components of the rehabilitation program set forth by the consultant psychiatrist are unwarranted or inappropriate. To the contrary, the individual seems to have accepted the consultant psychiatrist's recommendations, and has begun to implement them. However, as of the time of the hearing, the individual had not yet begun his recovery/therapy program, and had only been abstinent for about two and one half months. Accordingly, I cannot find that the individual has demonstrated rehabilitation at this time.

##### Criterion L

The individual has also not mitigated the Criterion L concerns regarding his 2001 and 2003 arrests for intoxication while driving/operating a motor vehicle.<sup>6</sup> With respect to the 2001

---

<sup>6/</sup> The individual claims that the 1982 and 1991 alcohol incidents cited in the Notification Letter are now in the distant past, and therefore should cause no security concern. However, I cannot dismiss them simply as long-passed events. To the  
(continued...)

incident, the individual asserted that the fact that he was acquitted at trial of the DWI charge proves that he was not intoxicated. I am not persuaded that his acquittal establishes that he was not intoxicated. The fact that the case was not proven to the satisfaction of a jury does not mean that the individual was not operating a motor vehicle in an impaired state. The individual has not brought forward evidence indicating the basis for the acquittal, which may have been on technical or procedural grounds. His defenses raised at trial may not have been related to whether he was intoxicated.

On the other hand, there is evidence in the record before me suggesting that the individual was intoxicated. The record indicates that the individual failed a field sobriety test, and refused to take a breath alcohol test. He stated that he refused the breathalyzer test because he "panicked." He stated, "I'd never been in that predicament before and didn't really know what to do." Transcript of August 28, 2001 Personnel Security Interview at 10 (hereinafter 2001 PSI Tr.); see also Tr. at 95. The individual claimed that he thought he had passed all portions of the field sobriety test, except for the balance aspect. He indicated that he had had knee surgery the prior January, and therefore his balance was not stable. 2001 PSI Tr. at 9.

These assertions do not resolve the security concern. I find unconvincing the individual's rationale for refusing the breath alcohol test. He had admittedly consumed about 6 mixed drinks over a period of about 5 hours. 2001 PSI Tr. at 8-11. In my view, had he been confident that he would have passed, he would have submitted to the test. Further, the individual's assertion that he thought he passed all aspects of the field sobriety test, but for the balance portion, is completely uncorroborated, as is his claim that his knee surgery seven months earlier caused his instability. The individual has therefore not persuaded me that he was not intoxicated at the time of his 2001 DWI arrest.

I am also not persuaded by the individual's testimony regarding the 2003 incident. He admits that he was intoxicated, but contends that he was just exiting his car, and an officer incorrectly concluded that he had been driving. Tr. at 88. He maintains that the police report to the contrary was in error. The report states the

---

6/ (...continued)

contrary, in the context of this case, they indicate to me a problem with alcohol that extends, albeit sporadically, more than 20 years.

following: "I [i.e., the arresting officer] observed a light blue Dodge Stratus. . . pulling to the curb and parking. I slowed as I was passing the vehicle and observed the operator exiting the vehicle. As the operator was exiting, he was holding onto the door and lost his balance and stumbled against the door." DOE Exhibit 3-3. Given the highly-detailed and specific description by the arresting officer of what she observed, I find it implausible that she erred in stating that she saw the individual parking his vehicle.

In sum, I am not convinced by the individual's attempts to minimize the seriousness of the two recent alcohol-related incidents. Accordingly, I find that the individual has not resolved the Criterion L concerns associated with his alcohol use.

#### V. CONCLUSION

As the foregoing indicates, the individual has not resolved the Criterion J and L security concerns cited in the Notification Letter. It is therefore my decision that restoring this individual's access authorization is not appropriate at this time.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton  
Hearing Officer  
Office of Hearings and Appeals

Date: May 6, 2005